

Vinson&Elkins

Gregory C. Staple gstaple@velaw.com
Tel 202.639.6744 Fax 202.879.8944

March 11, 2005

Mr. Thomas Chandler
Chief, Disabilities Rights Office
Consumer and Government Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Declaratory Ruling Regarding Hands-On Video Relay Services, Inc.
CC Docket No. 98-67 and CG Docket No. 03-123

Dear Mr. Chandler:

Further to my telephone conversation with you, this is written on behalf of Nordia Inc., a competitive provider of Telecommunications Relay Service (TRS) in California, regarding the above referenced declaratory ruling requested by Hands-On Video Relay Services, Inc. (Hands-On) and released on January 26, 2005 (*Hands-on Ruling*).¹

There is currently no legal or factual basis for extending the *Hands On Ruling* to the free interstate long distance service provided to California TRS users in connection with the state's new regime for competitive relay services. If the Bureau were summarily to require Nordia and other California TRS providers to withdraw such free service, on pain of being declared ineligible for compensation from the Interstate TRS Fund, it could jeopardize Nordia's ability to compete, impose hundreds of thousands of dollars in new toll charges on the hearing and speech impaired, and adversely impact the competitive provision of intrastate as well as interstate relay services.

These public interest considerations, as well as basic principles of due process, strongly suggest that, if the Bureau now thinks that the law prohibits TRS providers from fully discounting interstate calls made by disabled users, though this apparently has been standard

¹ *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 98-67 et al, *Declaratory Ruling*. DA 05-140, released January 26, 2005 (C&GA Bureau).

commercial practice in California since at least 2001, then it should issue a Public Notice so stating. Any such Notice should provide a reasonable opportunity for public comment on the Bureau's conclusion and, if the Bureau's position were to be adopted, the time period that is required for all affected TRS providers to implement a lawful charging system for interstate long distance calls.

The latter issue is of particular concern to Nordia because the timetable for implementing any new charging rule for TRS calls and the associated TRS Fund eligibility cut off may unfairly advantage one existing TRS provider over another. Nordia entered the TRS market solely to provide competitive call center services and does not operate its own interstate or intrastate telecommunications networks but rather must contract for these interconnecting facilities, including billing services, with one or more third parties. As such, the establishment of a billing process for interstate TRS calls is likely to impose a greater burden on Nordia vis-à-vis a company that has a vertically integrated call center-long distance business and Nordia may correspondingly require a longer period to reconfigure its operations to implement any FCC rule change.

Discussion

In the *Hands-On Ruling*, the Bureau held that a customer loyalty program offered by Hands-On to California Video Relay Service (VRS), providing customers with an opportunity to offset their bills for high speed Internet access by choosing Hand On's VRS, was inconsistent with Section 225 of the Communications Act of 1934 and the FCC's TRS regulations.² In addition, the Bureau stated that "any program that involves the use of any type of financial incentives to encourage or reward a customer for placing a TRS call"³ was prohibited by Section 225 and the TRS implementing regulations. The ordering clause of the *Hands-On Ruling* states that TRS providers offering any kind of financial incentives or rewards "SHALL, effective March 1, 2005, be ineligible for compensation from the Interstate TRS Fund."⁴

In December 2004, the state of California initiated a new competitive framework for the provision of various telecommunications relay services that, for the first time, provided persons with a hearing or speech disability a choice of three TRS call center providers:

² See 47 U.S.C. Section 225; 47 CFR Section 64.601et seq.

³ *Id.*, ¶11.

⁴ *Hands-On Ruling*, supra at ¶11.

Nordia, Sprint, and MCI. In order to compete on an equal footing with the two incumbent providers (MCI and Sprint), as well as with Internet based service providers offering IP Relay and VRS, Nordia has offered customers in California toll free service for interstate as well as intrastate calls placed *via* its call center. Both Sprint and MCI provide a like accommodation to California TRS customers - - an accommodation that, to Nordia's knowledge, has been offered by both carriers since at least 2001 and has been accepted by the California PUC. When Nordia sought to enter the California TRS market, Nordia predicated its business plan on providing free long distance service to all customers so that no customer would have a financial disincentive to use Nordia's service for either intrastate or interstate calls.

It is Nordia's view that, given the unique competitive framework established by the California PUC for TRS services, the fully discounted interstate service provided by Nordia does not constitute an improper financial incentive under Section 225 of the Act or the TRS regulations. Section 225 and the TRS regulations only "require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services" but do not bar a TRS provider from offering lower rates or even giving the service away.⁵ Further, unlike the promotional program addressed by the *Hands On Ruling*, Nordia does not offer TRS users any non-call related benefit to use its service.⁶

Lack of Notice; Financial Hardship on Nordia

It is also Nordia's view that fundamental considerations of due process preclude the Bureau from applying the *Hands On Ruling* to Nordia's free long distance services without providing all interested parties fair notice and an opportunity for comment. Neither the plain text of Section 225 nor the implementing regulations for the TRS program expressly bar a provider from offering free interstate service to TRS customers. The *Hands On Ruling* does not provide adequate notice either because it deals only with non-call related incentives and clearly implied that call related promotions are distinguishable.

⁵ See 47 USC §225(d)(D) and 47 CFR §64.604(c)(4).

⁶ Paragraph 5 of the *Hands On Ruling* expressly notes that call related discounts offered by a telephone long distance company to customers are distinguishable from non-call related promotional incentives because the user has already elected to choose the service which is subject to the discount.

The Courts have made it clear that the greater the penalty for non compliance - - which here, involves being denied compensation from the TRS Fund - - the more precise must be the FCC's notice as to the rule or policy at issue.⁷ As the D.C. Circuit said in *Trinity Broadcasting v. FCC*, “[b]efore an agency can sanction a company for its failure to comply with regulatory requirements, the agency must have either put this language into [the regulation] itself or at least reference this language in [the regulation].” 211 F.3rd 618, 631 (D.C. Cir. 2000) (quoting *United States v. Chrysler Corp.* 158 F.3rd 1350, 1356 (D.C. Cir. 1988)). Neither the FCC's TRS regulations or the *Hands On Ruling* satisfy this standard.

There are also several other public interest reasons why the Bureau should not resolve the legal status of the free interstate services provided by TRS carriers in California without further notice and comment.

First, the Bureau's decision to forbid the free service now offered to thousands of hearing impaired and disabled users in California could disrupt the carefully tailored regime for competitive TRS established by the California PUC just three months after it has begun. Any changes in the charges applicable to long distance calls is likely to generate considerable confusion amongst the program's users and could altogether discourage some callers, especially if providers must impose charges for interstate calls while intrastate long distance calls remain toll free. Few TRS users are likely to understand the rationale for such an FCC mandated change, assuming that a valid legal rationale exists, which Nordia doubts.

Second, Nordia's business may be uniquely impacted if it is required to charge for long distance calls because, unlike the two other incumbent TRS operators, Nordia does not operate its own interstate or intrastate long distance network. Nordia entered the TRS market at the California PUC's invitation solely to provide competitive call center services and contracts with third party long distance networks to provide connectivity to interstate and intrastate customers. Nordia itself, therefore, has no direct customer billing relationship for interstate or intrastate toll services with any TRS user. Consequently, if Nordia were required to impose toll charges on persons using its call center services for interstate calls, it is likely to face disproportionately high administrative expenses because it will be required to renegotiate its current long distance to include a billing agreement and to reconfigure its own

⁷ See e.g. *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985); *Radio Athens Inc. (WATH) v. FCC* 401 F.2d 398, 401 (D.C. Cir. 1968).

network software to interoperate with any new billing platform offered by its third party carriers.

In these circumstances, if the Bureau were to cut off a TRS provider from access to the Interstate TRS Fund if it does not begin charging for interstate calls by a given date, Nordia could be driven out of business if the date fixed by the Bureau did not provide it with sufficient time to comply with the agency's new policy. It is thus vitally important for Nordia's business and the future of relay service competition that any change in the status quo regarding interstate long distance rates be implemented on a date when all affected TRS providers can do so simultaneously. In order to determine that date, the Bureau must establish an adequate public record based on comments from all interested parties.

When the Commission adopts a new rule or policy that requires existing carriers to reconfigure their networks or renegotiate their interconnection arrangements, it has traditionally sought public comment. Upon adopting revised rules, the Commission has also provided affected parties a reasonable time to comply. Most recently, by way of example, following prior notice and at least two rounds of public comment, the Commission provided competitive local exchange carriers 12 to 18 months to establish new supply arrangements following the adoption of modified Unbundled Network Element (UNE) rules.⁸ The Bureau should follow a similar course here.

Finally, to Nordia's knowledge, there is no urgent reason for the Bureau to summarily resolve the status of free interstate TRS service under Section 225 and the TRS regulations. The provision of free interstate TRS service in California has been a standard commercial practice since at least 2001 and is now an accepted part of the new competitive regime for TRS. This regime has generated significant benefits for individuals with hearing or speech disabilities. Nordia does not openly advertise that it fully discounts interstate TRS calls and there is no evidence that the *status quo* has stimulated an undue number of TRS calls or placed an undue burden on the Interstate TRS Fund. On the contrary, to the extent TRS users are aware of the applicable changing practices, the current arrangements have likely led to a reduced burden on the TRS Fund by placing the cost of making interstate TRS calls on parity with that for Internet-based TRS offerings, such as VRS, which, of course, are not subject to any interstate toll charges and are compensated at a much higher rate by the TRS Fund.

⁸ See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 et al. *Order on Reconsideration*, FCC 04-290, released February 4, 2005, ¶ 226-228.

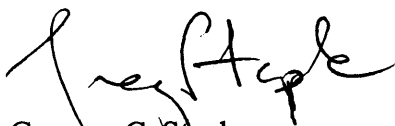
Conclusion

For all of the reasons stated above, the Bureau should not apply the *Hands On Ruling* to the free interstate TRS service offered by Nordia (or similarly situated parties) absent further notice and opportunity for all interested parties to file written comments including, in particular, the TRS users in the hearing and speech impaired communities that will be directly affected by any rule change. In addition, any such public notice should expressly seek comment on the time required for Nordia and other carriers to establish long distance billing arrangements for TRS users so that no party is prejudiced by any change in the FCC's rules and policies.

If the Bureau wishes Nordia to file a formal request for a declaratory ruling regarding the free interstate TRS service discussed here, Nordia will promptly do so.

Please contact me directly regarding any such request or if you have any questions regarding this letter.

Sincerely,



Gregory C. Staple
Counsel for Nordia, Inc.

cc: Marlene H. Dortch, FCC Secretary
Jay Keithley, Acting Chief, Consumer and Government Affairs Bureau
Michael B. Fingerhut, Sprint
Larry Fenster, MCI
Jennifer Pesek, California Coalition of Agencies Serving the Deaf or
Hard of Hearing